UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

VALLEY HOSPITAL MEDICAL CENTER, INC.,
d/b/a VALLEY HOSPITAL MEDICAL CENTER

and Case 28–CA–213783

LOCAL JOINT EXECUTIVE BOARD
OF LAS VEGAS

Katherine E. Leung, Esq.,
for the General Counsel.
Thomas H. Keim, Jr., Esq. (Ford & Harrison, LLP),
for the Respondent Company.
Kimberley C. Weber, Esq. (McCracken, Stemerman & Holsberry, LLP),
for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that Valley Hospital Medical Center unilaterally stopped making authorized union-dues deductions from employees' pay after its most recent, 2013–2016 collective-bargaining agreement with the Local Joint Executive Board of Las Vegas expired, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA).[1]

I. THE RELEVANT FACTS

Valley Hospital's 2013–2016 agreement with the Local Joint Executive Board (Culinary Workers Local 226 and Bartenders Local 165) contained numerous articles addressing various terms and conditions of employment, including "Union Security" (Article 4). The union security article contained several sections, including one titled "Check-Off" (4.03), which stated as follows:

> The Check-Off Agreement and system heretofore entered into and established by the Employer and the Union for the check-off of Union dues by voluntary authorization, as set forth in Exhibit 2, attached to and made a part of this Agreement, shall be continued in effect for the term of this Agreement.

[1] The Union filed the underlying charge on January 26, 2018, and the NLRB Regional Director issued the complaint and notice of hearing on May 10. Thereafter, on August 3, the General Counsel and the Company filed an unopposed motion under Section 102.35(a)(9) of the Board's rules requesting that the case be decided by an administrative law judge based on an attached stipulation of facts and supporting exhibits. Associate Chief Administrative Law Judge Gerald Etchingham granted the motion on August 6, and the General Counsel, the Company, and the Union thereafter filed briefs on September 10. The Board's jurisdiction is uncontested and established by the Company's admissions and stipulations of fact.

The referenced Exhibit 2 contained both a "Check-off Agreement" and a "Payroll Deduction Authorization" form. The checkoff agreement provided that, pursuant to the above union security provision, Valley Hospital agreed, "during the term of the Agreement," to deduct union membership dues (excluding initiation fees, fines and assessments) each month from the pay of those employees who had voluntarily submitted a written deduction authorization form. The deduction authorization form stated that the authorization would remain in effect and be irrevocable from year to year, regardless of whether the employee is a union member, unless the employee revoked it by sending written notice to the Company and the Union by registered mail during a period of 15 days immediately succeeding any yearly period subsequent to the date of the authorization or subsequent to the date of termination of the applicable contract between the Company and the Union, whichever occurs sooner. The form also contained numerous other provisions regarding how the monthly dues deductions would be made.

The union security article also contained a section titled "Union Shop" (4.01). The section stated that, "subject to the provisions of the Labor Management Relations Act, 1947, as amended," all employees were required, as "a condition of their employment," to become and remain members of the Union "throughout the period of their employment" with the Company.[2] However, the following section (4.02), titled "Effect of State Laws," stated that the union shop provision would not be applicable if it conflicted with applicable law. Nevada is a so-called "right to work" state and outlaws such provisions (Nev. Rev. Stat. 613.230–613.300). Thus, the union shop provision was void and inapplicable to the bargaining unit employees.

The 2013–2016 agreement expired on December 31, 2016.[3] Nevertheless, the parties continued operating under its terms thereafter, including the dues-checkoff provision, in the absence of any new agreement. However, on February 1, 2018, approximately 13 months after the agreement expired, Valley Hospital stopped deducting and remitting union dues. It did so unilaterally, without affording the Union an opportunity to bargain over the matter.[4]

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[2] Under the LMRA, employment may be conditioned on union membership, but union membership may be conditioned only on the payment of fees and dues; thus "membership" as a condition of employment "is whittled down to its financial core." *NLRB v. General Motors Corp*., 373 U.S. 734, 742 (1963).

[3] The 2013–2016 agreement provided (article 31) that it would continue "in full force and effect" from "year to year thereafter" absent 90 days written notice to change, modify or terminate it, and there is no dispute that the parties were still operating under the agreement's terms at the time of the relevant events here. However, the parties all agree that the agreement expired on December 31, 2016. See the Company's brief at 2; the Union's brief at 3; and the General Counsel's brief at 14.

[4] See Valley Hospital's January 26, 2018 notice of its decision. Valley Hospital admits that it did not provide the Union an opportunity to bargain before subsequently implementing its decision on February 1.

II. ANALYSIS

In *Bethlehem Steel*, 136 NLRB 1500 (1962),[5] the Board held that, like union shop or similar union security provisions, dues-checkoff provisions that implement such union security provisions generally terminate upon contract expiration. The Board also noted that the particular language of the checkoff provision in that case expressly linked the employer's checkoff obligation with the duration of the contract, stating that the employer would deduct union dues "so long as this Agreement shall remain in effect." Accordingly, the Board held that the employer did not violate Section 8(a)(5) of the Act by unilaterally ceasing such dues deductions after the agreement expired.

Thereafter, in *Tampa Sheet Metal*, 288 NLRB 322, 326 n. 15 (1988), the Board reached the same conclusion—that the employer there lawfully ceased deducting union dues after the contract expired—even though the subject facility was in a right to work state (Florida) and the dues-checkoff provision in the expired contract therefore did not implement any such union security provision. Further, unlike in *Bethlehem Steel*, the Board did so without referring to or relying on the particular language of the dues-checkoff provision.

The Board subsequently reaffirmed this precedent in *Hacienda Resort Hotel and Casino*, 331 NLRB 665 (2000) (*Hacienda I*), a case involving the very same union and dues-checkoff provisions as here.[6] Like here, the employer in that case had ceased deducting union dues about a year after the parties' agreement expired. The Board held that *Bethlehem Steel* and its progeny, including *Tampa Sheet Metal*, established a "bright line rule" that an employer's dues-checkoff obligation terminates at contract expiration, and that Hacienda's unilateral action was therefore lawful. The Board also noted that, like in *Bethlehem Steel*, the dues-checkoff provision "clearly tie[d] the checkoff agreement to the duration of the contracts," but the Board did not base its decision on that language. Id. at 667.

The Union subsequently appealed, however, and the Ninth Circuit remanded on the ground that the Board had failed to provide any rationale for applying the *Bethlehem Steel* rule in a right to work state. The court instructed the Board on remand to "articulate a reasoned explanation for the rule it adopted, or adopt a different rule and present a reasoned explanation to support it." *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 586 (2002).

On remand, the Board reached the same result, but did so for the language-specific reason it had disclaimed reliance on in *Hacienda I*. That is, the Board found that the employer lawfully ceased deducting dues after the contract expired because the dues-checkoff provision and exhibit 2 contained "clear language linking dues-checkoff to the duration of the agreement," and that the Union "thereby explicitly waived any right to the continuation of dues checkoff as a term and

[5] Remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[6] Although not entirely clear, it appears that the union security clause in *Hacienda* also contained a union shop provision, which was likewise nullified by a provision regarding the effect of state laws. See *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1076 (9th Cir. 2008).

condition of employment" after expiration of the agreement. The Board therefore found it unnecessary to address the issue that had engendered the court's remand, i.e., whether or why dues-checkoff provisions should terminate as a general rule. 351 NLRB 504, 505 (2007) (*Hacienda II*).

The Union again appealed, however, and the Ninth Circuit rejected the Board's alternative, language-specific ground for finding that the employer's dues-checkoff obligation terminated. The court held that the Board's decision was clearly inconsistent with prior Board decisions finding that similar contractual language failed to satisfy the "clear and unmistakable waiver" test set forth in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).[7] The court therefore again remanded the case to the Board, repeating its original instruction to "explain the rule it adopted in *Hacienda I*, or abandon *Hacienda I* to adopt a different rule and present a reasoned explanation for it." 540 F.3d 1072, 1083 (2008).

Unfortunately, on remand, one of the Board members was recused and the remaining four deadlocked 2–2 and could not reach a majority view regarding the appropriate general rule. Accordingly, as the court's decision had "closed" the "'clear and unmistakable' escape hatch" (540 F.3d at 1082), the Board simply reaffirmed its original decision in *Hacienda I* applying the general rule of *Bethlehem Steel* and its progeny, without providing any additional reasoning or explanation. 355 NLRB 742 (2010) (*Hacienda III*).

Not surprisingly, the Union again appealed, and the Ninth Circuit again found the Board's response to its remand inadequate. Further, instead of issuing another remand, which the court concluded would be "futile," the court considered and addressed the issue de novo. The court found that there was no justification for applying *Bethlehem Steel* in a right to work state where dues checkoff did not exist to implement union security. The court therefore held that, in such situations, "dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining," and may not be unilaterally terminated after contract expiration. 657 F.3d 865, 876 (2011).

This was the state of Board and Ninth Circuit law at the time Valley Hospital and the Union executed their 2013–2016 agreement.[8] However, Board law with respect to the appropriate general rule subsequently changed significantly in 2015, during the term of the parties' agreement. The Board at that time went even farther than the Ninth Circuit, rejecting the general rule of *Bethlehem Steel* and its progeny even where the expired agreement also contained

[7] The Board did not dispute before the court that the *Metropolitan Edison* "clear and unmistakable waiver" standard applied. 540 F.3d at 1075. Rather, consistent with its decision, the Board argued that the waiver was in fact clear. Id. at 1080. It also argued that the prior Board decisions cited by the court were factually distinguishable. Id. at 1081 nn. 13 and 14.

[8] The parties executed the agreement in April 2014, retroactive to January 1, 2013.

a valid union shop or similar union security provision.[9] *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015). Accordingly, the Board overruled those decisions and held that "like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective bargaining agreement that establishes such an arrangement." Slip op. at 1–2.

Citing the foregoing Board and Ninth Circuit precedent—both the Board's 2015 *Lincoln Lutheran* decision and the Ninth Circuit's 2011 decision in *Local Joint Executive Board*—the General Counsel and the Union argue that Valley Hospital's February 2018 postexpiration refusal to continue making authorized dues deductions was clearly unlawful. However, as indicated by Valley Hospital (Br. 4), in doing so the General Counsel and the Union ignore the language of the dues-checkoff provision and exhibit 2. As indicated above, the Board in *Hacienda II* held that the identical language clearly limited the employer's dues-checkoff obligation to the duration of the agreement. Although the Ninth Circuit in 2008 rejected the Board's decision in *Hacienda II*, the Board itself has never expressly overruled it.[10] In *Lincoln Lutheran*, the dues-checkoff provision did not contain any limiting language. See slip op. at 1 n. 2. Thus, there was no need in that case to revisit the Board's holding in *Hacienda II*, and the Board did not do so.[11] Rather, the Board in a footnote simply acknowledged that, notwithstanding its new general rule, parties could "expressly and unequivocally" agree otherwise, i.e., that a union could choose to waive its right to bargain over an employer's postexpiration unilateral changes to dues checkoff, and that such a waiver would be valid if it was "clear and unmistakable." Slip op. at 9 n. 28.

It could be argued that other Board decisions have implicitly overruled *Hacienda II*. See *Finley Hospital*, 362 NLRB No. 102 (2015) (employer's unilateral post-expiration discontinuation of pay raises was unlawful notwithstanding that the relevant contract provision thrice stated that the rate increases would apply "during the term" or "for the duration" of the agreement), enf. denied 827 F.3d 720 (8th Cir. 2016); and *Wilkes-Barre General Hospital*, 362

[9] The Ninth Circuit in *Local Joint Executive Board* did not "express[ ] an opinion on the wisdom of the rule of *Bethlehem Steel,*" but stated that it could "see why the Board would treat dues-checkoff in the same manner as union security where both are present." 657 F.3d at 875. See also the court's subsequent decision on appeal of the Board's decision on remand regarding the appropriate remedy, 883 F.3d 1129, 1136 (2018) ("As for *Bethlehem Steel*, we explicitly declined to 'express[ ] an opinion on the wisdom of the rule' in that case. Rather, we merely held that the rule in *Bethlehem Steel* did not apply when, as here, there is no union security clause for dues-checkoff to implement."), vacating and remanding 363 NLRB No. 7 (2015).

[10] The Board does not acquiesce in contrary circuit court precedent, but will instead regard such court rulings as the law of the case only. See *D.L. Baker, Inc*., 351 NLRB 515, 529 n. 42 (2007) (summarizing the reasons for the Board's nonacquiescence policy). Accordingly, administrative law judges must follow and apply extant Board precedent unless and until it is overruled by the Supreme Court or the Board itself. Ibid. See also *Western Cab Co*., 365 NLRB No. 78, slip op. at 1 n. 4 (2017).

[11] There was also no need to address the particular language of the dues-checkoff provision because the Board declined to apply its new general rule retroactively, and therefore dismissed the complaint based on the old general rule.

NLRB No. 148 (2015) (same, notwithstanding that the agreement stated that the negotiated wage scale and increases would apply "during the term" of the agreement), enfd. 857 F.3d 364 (D.C. Cir. 2017). However, as indicated by the Ninth Circuit, the Board had issued similar decisions regarding virtually identical language even before *Hacienda II*. Further, the Board in *Finley Hospital* specifically distinguished *Hacienda II* on the ground that, under then-current Board law, dues checkoff was an exception to the general rule requiring employers to maintain contractual terms postexpiration. Slip op. at 4 n. 7. As indicated above, that was likewise still the Board law at the time Valley Hospital and the Union executed the 2013–2016 agreement containing the same language.[12] Finally, neither the General Counsel nor the Union argue that *Hacienda II* has been implicitly overruled; as indicated above, they both ignore the issue altogether.

It might also be argued that, even assuming the contract language clearly permitted Valley Hospital to cease deducting dues upon contract expiration, the Company's continued deduction of dues for over a year after the agreement expired created a past practice preventing it from unilaterally discontinuing such deductions without bargaining. Cf. *Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 10 (2016) (finding that the hospital's unilateral postexpiration cessation of anniversary step wage increases was unlawful in part because the hospital had continued granting such increases for 7 months after the contract expired), enfd. 890 F.3d 286 (D.C. Cir. 2018).[13] However, as indicated above, the employer in *Hacienda* likewise did not discontinue dues deductions until a year after the contract expired. Yet, the General Counsel did not allege, and the Board did not find, a violation on that basis in *Hacienda II*. See also *West Co*., 333 NLRB 1314, 1315 n. 6, 1320 (2001) (finding no violation even though the employer did not discontinue dues checkoff until several months after the contract expired). And, again, neither the General Counsel nor the Union has argued that a violation should be found on that basis here.

Accordingly, contrary to the complaint, Valley Hospital did not violate section 8(a)(5) and (1) of the Act by failing to continue deducting and remitting union dues in February 2018.

[12] See *Hacienda I*, 331 NLRB at 667 ("It is axiomatic that contract negotiations occur in the context of existing law, and, therefore, a contract provision must be read in light of the law in existence at the time the agreement was negotiated. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956); and *NLRB v. Southern California Edison Co*., 646 F.2d 1352, 1365 (9th Cir. 1981)."). Although the Ninth Circuit in 2008 and 2011 had rejected the Board's positions regarding both the general rule and the particular duration language, the General Counsel and the Union do not argue that the duration language of the dues-checkoff provision in the 2013–2016 agreement should be interpreted or evaluated differently as a result.

[13] The Board has held that it is not unlawful for an employer to continue deducting dues after the contract expires pursuant to valid and unrevoked employee checkoff authorizations. See *Tribune Publishing Co*., 351 NLRB 196, 197 n. 8 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009); *Frito-Lay*, 243 NLRB 137, 138 (1979); and *Lowell Corrugated Container Corp*., 177 NLRB 169, 173 (1969), enfd. 431 F.2d 1196 (1st Cir. 1970). See also *Lincoln Lutheran*, slip op. at 7.

ORDER[14]

The complaint is dismissed.

Dated, Washington, D.C., September 19, 2018

Jeffrey D. Wedekind
Administrative Law Judge

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.